92-152

No. _____

Supreme Court, U.S.
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In The

# Supreme Court of the United States

October Term, 1992

DR. FRANK P. KOSIK,

*Petitioner,*

v.

CLOUD COUNTY COMMUNITY COLLEGE,

*Respondent.*

**Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas**

## PETITION FOR WRIT OF CERTIORARI

CLARENCE L. KING, Jr.
Counsel of Record
HAMPTON, ROYCE, ENGLEMAN AND NELSON
119 W. Iron, Ninth Floor
P.O. Box 1247
Salina, Kansas 67402-1247
(913) 827-7251
and
TERRY D. CRISS
HAMPTON, ROYCE, ENGLEMAN AND NELSON
119 W. Iron, Ninth Floor
P.O. Box 1247
Salina, Kansas 67402-1247
(913) 827-7251

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## Question Presented for Review

Whether, in a pre-termination hearing, due process of law requires an employer to provide an employee, who has a property interest in his continuing employment, with an explanation of the evidence upon which the employer has based its decision to nonrenew the employee's contract of employment?

## Parties to the Proceedings

The parties to these proceedings are:

Dr. Frank P. Kosik, plaintiff, appellee/cross-appellant, petitioner

and

Cloud County Community College, defendant, appellant/cross-appellee, respondent

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**Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas**

## PETITION FOR WRIT OF CERTIORARI

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Dr. Frank P. Kosik ("Dr. Kosik") respectfully prays that this Court issue a writ of certiorari to review the opinion entered by the Supreme Court of the State of Kansas on February 28, 1992.

### Official and Unofficial Reports of Other Courts

1. Journal Entry of Judgment; District Court of Cloud County, Kansas; February 11, 1991

2. Journal Entry of Judgment; District Court of Cloud County, Kansas; April 25, 1991

3. Journal Entry of Judgment; District Court of Cloud County, Kansas; April 25, 1991

4. Memorandum Opinion; Supreme Court of the State of Kansas; February 28, 1992; 250 Kan. 507, 827 P.2d 59

5. Order Denying Motion for Modification or Rehearing; Supreme Court of the State of Kansas; April 22, 1992

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**Jurisdiction of this Court**

This is a Petition for a Writ of Certiorari to the Supreme Court of the State of Kansas. This action was originally filed by Dr. Frank P. Kosik against Cloud County Community College in the District Court of Cloud County, Kansas, alleging violation of his right to due process and breach of contract. After trial to a jury, judgment was entered in favor of Dr. Kosik on his claim that his right to due process of law, as guaranteed by the Fifth and Fourteenth Amendments to the United States Constitution, was violated by the Cloud County Community College when it nonrenewed his contract of employment as the Director of its Learning Resources Center. The jury awarded Dr. Kosik $40,000.00 lost wages and $25,000.00 for physical illness and emotional suffering.

On post-trial motions, the District Court of Cloud County, Kansas, further ordered Cloud County Community College to either reinstate Dr. Kosik or to pay him the wages he would have earned through the anticipated date of his retirement. Additionally, the District Court of

Cloud County, Kansas, ordered Cloud County Community College to pay Dr. Kosik's attorney fees pursuant to 42 U.S.C. § 1988. Cloud County Community College timely filed its Notice of Appeal on all issues decided adversely to it, and Dr. Kosik filed Notice of Cross-Appeal on the issue of whether good cause existed to nonrenew his contract, which was decided in favor of Cloud County Community College.

On February 28, 1992, the Supreme Court of the State of Kansas entered its decision reversing the jury's determination that Dr. Kosik's right to due process had been violated (and reversing all portions of the judgment awarding compensation and attorney fees to Dr. Kosik) but otherwise affirmed the judgment entered in the District Court of Cloud County, Kansas. Dr. Kosik timely filed his Motion for Modification or Rehearing and same was denied by the Kansas court on April 22, 1992.

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257(a) which provides in pertinent part:

> Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where . . . any title, right, privilege or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

**Constitutional Provisions and Statutes Involved**

This petition for a writ of certiorari involves both constitutional and statutory provisions. Foremost among these are the Fifth Amendment to the United States Constitution which guarantees:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any Criminal Case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

and Section 1 to the Fourteenth Amendment to the United States Constitution, which states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Upon violation of his right to due process Dr. Kosik brought suit under the provisions of 42 U.S.C. § 1983 which states:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or any other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

Dr. Kosik also sought recovery of his attorney fees pursuant to 42 U.S.C. § 1988:

> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against the law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal

> nature, in the infliction of punishment on the party found guilty. In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 U.S.C. §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 U.S.C. §§ 1681 et seq.], or title VI of the Civil Rights Act of 1964 [42 U.S.C. §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

## Statement of the Case

Dr. Frank P. Kosik was employed by Cloud County Community College as the director of its Learning Resources Center in August, 1983. Thereafter, Dr. Kosik's contract of employment was renewed for each subsequent academic year through and including the 1988-1989 academic year.

On April 21, 1989, Dr. James E. Douglass, Cloud County Community College's Dean of Instruction and Dr. Kosik's direct supervisor, wrote to Dr. Kosik, indicating that the intent of Cloud County Community College's Board of Trustees (which, by statute, governs the college) was to nonrenew his contract. Dr. Douglass invited Dr. Kosik to meet with Dr. James P. Ihrig, Cloud County Community College's President, and himself to discuss whether Dr. Kosik should resign his position to avoid nonrenewal of his contract.

Upon receipt of the April 21, 1989, letter, Dr. Kosik felt that his rights were in grave jeopardy and immediately retained legal counsel. Thereafter, Cloud County

Community College denied Dr. Kosik the opportunity to meet with Dr. Ihrig and Dr. Douglass, as had been suggested in Dr. Douglass' April 21, 1989, letter, because, as stated at trial by Dr. Douglass, once Dr. Kosik retained attorneys, "the die had been cast," and because the Board's policy prohibited attorneys from appearing at hearings on nonrenewal. Ironically, however, the policy prohibiting attorneys from attending the due process hearing had not yet been invoked by the Board and was not set into process until May 15, 1989.

On May 15, 1989, the Board of Trustees met at its regular monthly meeting. After meeting in executive session "to discuss a personnel item," the Board passed a resolution declaring its intent to nonrenew Dr. Kosik's contract for the 1989-90 academic year. Notice of intent to nonrenew Dr. Kosik's contract of employment was sent to Dr. Kosik by certified mail. The body of the notice stated:

> You are hereby notified that at a meeting of the Board of Trustees of Cloud County Community College, County of Cloud, State of Kansas, on the 15th day of May, 1989, the board declared its intent that your contract of employment not be renewed for the 1989-1990 school year.
>
> You have the right to request a meeting in executive session with the board of trustees. Your request must be in writing and must be filed with the clerk of the board of trustees within ten (10) days of your receipt of this notice. At the meeting, the board will specify its reason or reasons for its intent not to renew your contract, and you shall have the opportunity to respond to the board. Neither side shall have the right to

> have counsel present, pursuant to Administrative Personnel Policies of the Board of Trustees of Cloud County Community College, policy no. AP 6.

No reasons for the Board's action were provided in the notice, nor was any evidence identified. Policy AP 6 of the Administrative Personnel Policies of the Board of Trustees of Cloud County Community College, as in effect at the time, states:

> *Termination and Nonrenewal*
>
> Administrators may be terminated or not renewed for any good cause. Whenever an administrator is to be nonrenewed or terminated, he/she shall be notified in writing in the event of nonrenewal by June 30, of the year in which the contract is to expire. Whenever an administrator is given written notice of a Board's intention to not renew or terminate the administrator's contract, the administrator may request a meeting with the Board by filing a written request therefor with the clerk of the board within ten days from the receipt of the written statement of nonrenewal or termination of a contract. The Board shall hold such a meeting within ten days after the filing of the administrator's request. The meeting provided for here shall be in executive session; and at such meeting, the Board shall specify the reason or reasons for the Board's intention not to renew or terminate the administrator's contract.
>
> The administrator shall be afforded the opportunity to respond to the Board. Neither party shall have the right to have counsel present. Within ten days after the meeting, the Board

> shall reconsider its reason or reasons for non-renewal or termination and shall make a final decision as to the matter.

In a letter dated May 22, 1989, Dr. Kosik requested the opportunity to meet with the Board of Trustees and also objected to the Board's disregard for his rights to due process. Dr. Kosik's letter stated in part:

> My request for a meeting with the Board is not to be interpreted as an approval or acceptance of the Board's Administrative Policy AP 6. I strenuously object to this policy and reject it for the same reasons that the courts have rejected many similar institutional policies, namely its unfairness, authoritarianism and secretiveness. The procedure outlined in this policy violates the due process provisions of the Constitution of the United States, and of the Constitution of the State of Kansas and of the pertinent Federal and State Statutes and the Case Law.

Due to scheduling conflicts, the ten day requirement under AP 6 was waived, and a meeting with the Board was scheduled for June 6, 1989. Legal counsel for the Board instructed its members not to give Dr. Kosik notice of the reasons upon which the Board was basing its intent to nonrenew the contract prior to that meeting.

At the June 6, 1989, meeting, Dr. Kosik was advised for the first time of the reasons the Board had declared its intent to nonrenew his contract. Nine items were set forth by the Board, as follows:

> 1. Conduct demonstrating lack of proper professional and personal respect towards staff and students causing resentment and offense.

2. Refusal to foster working relationships with college staff in an effort to enhance the overall learning atmosphere of the LRC and achieve harmony in the use of the LRC among students, staff and LRC personnel.

3. Rigid and inappropriately harsh enforcement of LRC rules causing resentment among staff and students and unnecessary inaccessibility to needed materials and equipment.

4. Public swearing and abusive conduct toward staff and students.

5. Inappropriate and offensive conduct which has alienated a number of college faculty members to a point that they avoid the use of the LRC, giving student assignments requiring use of the LRC and any contact whatsoever by the faculty or students with Dr. Kosik.

6. Inappropriate and offensive conduct towards students causing some students to be uncomfortable about or even to avoid using the LRC.

7. Offensive and inappropriate conduct resulting in the underutilization of the LRC to the detriment of the college, its faculty and students.

8. Termination of a support staff employee without the requisite administration approvals in violation of Board policies.

9. Termination of support staff employee knowingly in direct contradiction of administration intentions and desires.

Items 8 and 9 were based on an incident which occurred on June 1, 1989, seventeen days after the Board declared

its intent to nonrenew Dr. Kosik's contract. The vague and ambiguous wording of the other seven items prevented Dr. Kosik from understanding those items.

At the meeting, Dr. Kosik addressed items 8 and 9, but told the Board he could not understand items 1 through 7 and stated that he had no idea to what those items referred. The Board failed to provide any further explanation of the reasons for nonrenewal. No evidence was produced in support of the reasons for nonrenewal, and none of the parties who provided information or evidence to the Board were identified.

On June 16, 1989, the Board met and, after an executive session, voted to nonrenew Dr. Kosik's contract. However, the Board eliminated items 8 and 9 from its list of reasons for nonrenewal. Dr. Kosik filed suit against Cloud County Community College in January, 1990, in the District Court of Cloud County, Kansas. In his original Petition, Dr. Kosik claimed that his right to due process had been violated by Cloud County Community College. After discovery, the parties filed their respective motions for summary judgment. These motions were denied by the District Court of Cloud County, Kansas. Dr. Kosik, pursuant to leave of the Court, filed an amended Petition which included, in addition to his due process claim, claims that his rights under 42 U.S.C. § 1983 had been violated, and that he was entitled to an award of attorney fees pursuant to 42 U.S.C. § 1988.

The action was tried to a jury on January 21-25, 1991. The jury found that Cloud County Community College had denied Dr. Kosik's right to due process and awarded him $40,000.00 in damages, plus an additional $25,000.00 for his physical pain and emotional distress. A copy of

the jury's verdict form is included in the appendix beginning on Page App. 26. The jury further found that Cloud County Community College had good cause to nonrenew Dr. Kosik's contract.

After conclusion of the trial, Dr. Kosik filed his motion for equitable relief in the form of reinstatement and/or front pay through the date of his retirement and his motion for award of attorney fees. Both parties filed motions for judgment notwithstanding the verdict on claims decided adversely by the jury. The District Court of Cloud County, Kansas, on March 25, 1991, awarded Dr. Kosik his attorney fees in the amount of $31,664.35, and ordered that Cloud County Community College either reinstate him to his position of employment or pay him front pay through the date of his retirement. The parties' respective motions for judgment notwithstanding the verdict were denied by the Court.

Cloud County Community College timely filed its appeal to the Court of Appeals to the State of Kansas, and upon later motion, the Supreme Court of the State of Kansas assumed jurisdiction of the appeal. Additionally, Dr. Kosik appealed from the jury's determination that there was good cause to nonrenew his contract of employment. On February 28, 1992, the Supreme Court of the State of Kansas issued its Memorandum Opinion, reversing the trial court's finding that Dr. Kosik had been denied due process of law and affirming the District Court of Cloud County, Kansas, in all other respects. Despite the undisputed fact that Cloud County Community College failed to explain any of the evidence on which its decision was based, the Kansas Supreme Court

held that Dr. Kosik's due process rights had not been violated.

Dr. Kosik timely filed his Motion for Modification or Rehearing, and same was denied by the Court on April 22, 1992.

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**Reasons for Allowance of this Writ**

The opinion delivered by the Supreme Court of the State of Kansas is in direct conflict with the due process standards enunciated by this Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 84 L.Ed. 2d 494, 105 S.Ct. 1487 (1985), because the Kansas court has eliminated the requirement that the employer explain its evidence to the employee at some time prior to termination of employment. In *Loudermill*, this Court stated:

> The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. [Citation omitted.] The tenured public employee is entitled to oral or written notice of the charges against him, ***an explanation of the employer's evidence***, and an opportunity to present his side of the story. [Citations omitted.] To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee. 470 U.S. at 546. [Emphasis added.]

The Kansas court's opinion is contrary to *Loudermill*, because it wholly ignores the failure of Cloud County Community College to explain the evidence upon which it made its decision to nonrenew Dr. Kosik's contract of employment, and thus effectively eliminates any such requirement in Kansas. The Kansas court's decision not only denies Dr. Kosik his due process rights but also lays the groundwork for other public employers to deny the due process rights of their employees. Without an explanation of the employer's evidence, the risk of erroneous termination decisions by Kansas employers will be significantly increased.

This Court's opinions in *Loudermill*, *Brock v. Roadway Express, Inc.*, 481 U.S. 252, 95 L.Ed. 2d 239, 107 S.Ct. 1740 (1987), *Arnett v. Kennedy*, 416 U.S. 134, 40 L.Ed. 2d 15, 94 S.Ct. 1633 (1974), and *Matthews v. Eldridge*, 424 U.S. 319, 47 L.Ed. 2d 18, 96 S.Ct. 893 (1976) clearly state that one whose property rights are in jeopardy may be afforded due process with something less than a full evidentiary hearing, if there is some kind of hearing held as an effective initial check against mistaken decisions. An explanation of the evidence upon which a decision is based is essential for a pre-termination hearing to satisfy the requirements of due process. The Kansas court's opinion, however, does not so hold, but rather eliminates the requirement that the employer's evidence be provided to the employee.

Dr. Kosik contends that the absence of any explanation of the evidence upon which Cloud County Community College based its preliminary decision deprived him of a meaningful opportunity to respond to the Board.

> . . . [T]he constitutional requirement of a meaningful opportunity to respond before a temporary deprivation may take effect entails, **at a minimum**, the right to be informed not only of the nature of the charges but also of the substance of the relevant, supporting evidence. If the employer is not provided this information, the procedures implementing § 405 contain an unacceptable risk of erroneous decisions. *Roadway Express*, 481 U.S. at 264, 265, 95 L.Ed. 2d at 252.

For this reason, Dr. Kosik respectfully prays that the Court issue its Writ of Certiorari to review the Memorandum Opinion of the Supreme Court of the State of Kansas.

Respectfully submitted,

CLARENCE L. KING, JR.,
Kansas Supreme Court No. 5207,
HAMPTON, ROYCE, ENGLEMAN
& NELSON
United Building, Ninth Floor
119 West Iron Avenue
P. O. Box 1247
Salina, Kansas 67402-1247
(913) 827-7251
*Counsel for Dr. Kosik*

IN THE SUPREME COURT OF
THE STATE OF KANSAS

No. 66,665

DR. FRANK P. KOSIK,
*Appellee/Cross-appellant,*

v.

CLOUD COUNTY COMMUNITY COLLEGE,
*Appellant/Cross-appellee.*

SYLLABUS BY THE COURT

1. To be entitled to due process of law, one must have a protected property interest. State law rather than the United States Constitution must provide the source of this property interest. Once the State has conferred a property interest, the property interest can be taken only by constitutional due process of law.

2. In Kansas, a public employee who may be discharged only "for cause" has a property interest in continued employment.

3. The statutory provisions for nonrenewal of administrators' contracts, K.S.A. 72-5451 *et seq.*, do not apply to community colleges. Therefore, the common-law rules and a community college's adopted rules of due process govern the nonrenewal of a community college administrator's contract. . . .

4. An essential principle of due process is that a deprivation of life, liberty, or property be preceded by notice and opportunity for hearing appropriate to the nature of the case.

5. Due process requires a balancing of competing interests. These competing interests include the private interest in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination.

Appeal from Cloud district court, THOMAS M. TUGGLE, judge. Opinion filed February 28, 1992. Affirmed in part and reversed in part.

*Stephen J. Dennis*, of Niewald, Waldeck & Brown, of Overland Park, argued the cause, and *Gregory W. Bruning*, of the same firm, was with him on the briefs for appellant/cross-appellee.

*Terry D. Criss*, of Hampton, Royce, Engleman & Nelson, of Salina, argued the cause, and *David D. Moshier*, of the same firm, was with him on the brief for appellee/cross-appellant.

The opinion of the court was delivered by

HERD, J.: Dr. Frank P. Kosik (Dr. Kosik) brought this action for breach of contract and violation of his procedural due process rights against his employer, Cloud County Community College (CCCC), after the CCCC Board of Trustees decided to nonrenew Dr. Kosik's contract. Following a trial to a jury resulting in an award of damages to Dr. Kosik CCCC appeals, claiming numerous trial errors. Dr. Kosik cross-appeals.

## FACTS

On August 1, 1983, Dr. Kosik entered into a series of one-year contracts to serve as the director of the Learning

Resources Center (LRC), the library and audio-visual laboratory, at CCCC. Dr. Kosik's contract was renewed annually up though [sic] the 1988-89 school year. All contracts signed each year by Dr. Kosik specified his status was that of Administrative Support Personnel. The administrative policies and procedures of CCCC provide administrators can be terminated or not renewed for any good cause.

Dr. Kosik was formally evaluated by the Dean of Instruction, Dr. James Douglass, on August 28, 1986. Dr. Douglass acknowledged Dr. Kosik's expertise "in the library and in all technical phases." Dr. Douglass, however, went on to state:

> "Explanation: Even though I recommended contract in June, the board was hesitant and your renewal was on a split vote. Obviously they were responding to a collection of adverse comments over a period of time. Hopefully, comments are beginning to be favorable."

In April 1987, 80 of the 600 students at CCCC signed a petition calling for a review of the appointment of Dr. Kosik to his position of director of the LRC. At the April 20, 1987, meeting of the CCCC Board of Trustees (Board), it was recommended that the administrative staff holding administrative and administrative support contracts be reappointed with the exception of Dr. Kosik. There followed a motion to develop and present to Dr. Kosik a list of directives for changes in his conduct. The next day Dr. Kosik received the list issued by the Board, which Dr. Kosik signed.

The issue of nonrenewal of Dr. Kosik's contract came up on almost a yearly basis and was brought up by the

Board. Leo Dreiling, Chairman of the Board, had been contacted personally by both students and parents of students with complaints about Dr. Kosik. Robert Champlin, a member of the Board at the time of Dr. Kosik's contract nonrenewal, recalled receiving letters of complaint from faculty and students regarding Dr. Kosik.

In the spring of 1989, after receiving various complaints from faculty about Dr. Kosik and his strict enforcement of rules and abusive behavior, Dr. Douglass decided to recommend to the Board that Dr. Kosik's contract be nonrenewed. Dr. Douglass did not discuss these complaints with Dr. Kosik. Dr. Douglass instead contacted David D. Swenson, legal counsel to the Board, and arranged for faculty members dissatisfied with Dr. Kosik's job performance to meet with Swenson.

On April 21, 1989, Dr. Douglass wrote to Dr. Kosik indicating the intent of the Board was to nonrenew his contract. At that time, the Board had not expressed officially such an intent but had discussed nonrenewal in executive session prior to April 21, 1989. In the letter, Dr. Douglass invited Dr. Kosik to meet with him and Dr. James P. Ihrig, CCCC's president, to discuss the matter.

Upon receiving the letter, Dr. Kosik hired legal counsel. Then, Dr. Kosik requested, through his attorneys, a meeting with Drs. Ihrig and Douglass to discuss renewal of his contract. The request was denied on the basis that attorneys are not allowed to participate in nonrenewal meetings between the Board and any administrator who has received notice of the Board's intent to nonrenew.

Before the Board's meeting on May 15, 1989, Swenson prepared a resolution declaring the Board's intent to nonrenew Dr. Kosik's contract. Swenson also prepared a list of reasons for nonrenewal for good cause. At the meeting the Board voted to send Dr. Kosik notice of intent to nonrenew his contract for the 1989-90 academic year. Dr. Kosik received the notice by certified mail.

On May 22, 1989, Dr. Kosik wrote a letter to the Board discussing his disagreement with the contract renewal process and his desire to accept the invitation of the Board to meet with it to discuss the renewal or nonrenewal of his contract. Dr. Kosik requested the date of the meeting with the Board be moved back from the 10 days after the Board's receipt of the meeting request as required by CCCC's Administrative Personnel Policy No. 6 (AP 6), and the Board complied with his request.

On June 6, 1989, the Board held a special meeting to discuss renewal or nonrenewal of Dr. Kosik's contract. The minutes from the special meeting reflect Dr. Kosik was in executive session with the Board for 55 minutes. At the beginning of the executive session with Dr. Kosik, the list of reasons for the nonrenewal of Dr. Kosik's contract was both orally read and a written copy given to Dr. Kosik by Leo Dreiling, Chairman of the Board.

Dr. Kosik brought fellow employees Janine Johnson and Donna Parker to the meeting on June 6, 1989. They were both allowed to address the Board on his behalf.

On June 16, 1989, prior to the Board meeting, members of the Board took a tour of the LRC. At the meeting itself, the Board reconsidered its reasons for nonrenewal and voted to nonrenew Dr. Kosik's contract. The vote was

four in favor, one abstaining, and one absent. Dan Farha, the Board member who abstained in voting for the nonrenewal, later testified he believed Dr. Kosik's contract should not have been renewed. Board member Keith Christensen did not attend the June 16, 1989, meeting. He testified at trial, however, that after considering all the information presented by Dr. Kosik, Johnson, and Parker he believed it was in CCCC's best interest to nonrenew the contract. Dr. Kosik was mailed notice of the nonrenewal on June 19, 1989.

At trial, Leo Dreiling testified he considered complaints he had heard prior to being elected to the Board in 1986, when voting at the June 16, 1989, meeting to nonrenew Dr. Kosik's contract. Dreiling did not discuss these earlier complaints with the Board. Another Board member, Lloyd Erickson, testified he made his decision to vote to nonrenew Dr. Kosik's contract prior to the June 6, 1989, meeting at which Dr. Kosik was advised of the reasons for nonrenewal. Robert Champlin seconded the motion to nonrenew Dr. Kosik's contract and voted in favor of the motion despite the fact that Champlin did not attend the June 6, 1989, meeting and did not attempt to find out what information Dr. Kosik had presented at that meeting. Champlin, however, had the letter written by Dr. Kosik in which Kosik explained why his contract should be renewed.

Dr. Kosik then filed suit against CCCC, claiming breach of his employment contract; violation of his due process rights, including a claim for damages under 42 U.S.C. § 1983 (1988) and attorney fees pursuant to 42 U.S.C. § 1988 (1988); and breach of the CCCC "master

contract," an agreement entered into by the CCCC Board and the Faculty Association of CCCC.

Prior to trial both parties filed motions for summary judgment, which the trial court denied. At trial CCCC moved for a directed verdict at the close of Dr. Kosik's case in chief and at the close of all the evidence. The trial court denied both motions.

Counsel for CCCC objected to various instructions submitted by the court, particularly the court's failure to use CCCC's proposed instruction No. 16 on due process requirements. During jury deliberations, the jury presented the court with a written question concerning whether damages could be awarded if the jury found no breach of contract. Over CCCC's objection, the court gave an answer to the jury's question.

The jury subsequently returned its verdict finding Dr. Kosik's 1988-89 employment was not covered by the master contract. The jury also found the Board had good cause to nonrenew Dr. Kosik's contract and, thus, did not breach his contract. The jury, however, did find CCCC violated Dr. Kosik's procedural due process rights and awarded him $40,000 for lost wages and benefits and $25,000 for physical illness and emotional suffering. The jury did not award Dr. Kosik damages for future lost wages and benefits or for future physical illness and emotional suffering.

After the trial was concluded, the trial court denied CCCC's motion for judgment notwithstanding the verdict and granted Dr. Kosik's motion for reinstatement or, in lieu thereof, award of future lost wages and back pay and fringe benefits in the amount of $170,304.19 based on a

due process violation. The trial court also granted Dr. Kosik's request for attorney fees and expenses in the amount of $31,664.35 pursuant to 42 U.S.C. § 1988.

I

First, we address the issue of whether the trial court erred in denying CCCC's motions for summary judgment, directed verdict, and judgment notwithstanding the verdict or, in the alternative, new trial. More specifically, the issue is whether the trial court erred in not ruling as a matter of law that Dr. Kosik's due process rights had not been violated.

To be entitled to due process Dr. Kosik must have a property interest in his continued employment with CCCC. State law rather than the United States Constitution must provide the source of this property interest. *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, 538, 84 L. Ed. 2d 494, 105 S. Ct. 1487 (1985). Once the State has conferred a property interest, the property interest cannot be taken without constitutional, procedural due process. 470 U.S. at 541. In Kansas, a public employee who may be discharged only "for cause" has a property interest in continued employment. *Gorham v. City of Kansas City*, 225 Kan. 369, Syl. ¶ 1, 590 P.2d 1051 (1979). CCCC's Administrative Personnel Policies provide "administrators may be terminated or not renewed for any good cause." CCCC in its motion for summary judgment relied upon *Burk v. Unified School Dist. No. 329, Wabaunsee Cty.*, 646 F. Supp. 1557 (D. Kan. 1986), and argued Dr. Kosik is of the same status as a nontenured teacher and could be nonrenewed for any reason or no

reason. CCCC has not asserted this contention on appeal, but neither party spells out the source of Dr. Kosik's right to due process. At oral argument, CCCC's counsel stated there was no provision for Dr. Kosik to be "tenured" but Dr. Kosik thinks of himself as tenured. On appeal, the parties do not dispute that Dr. Kosik has a protected property interest. We so hold.

Unlike teacher termination cases and most cases involving administrators, this case is not governed by statute. K.S.A. 1991 Supp. 72-5439 governs the procedural due process requirements for terminating a teacher's contract. The statutory provisions for nonrenewal of administrators' contracts, K.S.A. 72-5451 *et seq.*, (Administrators' Act), do not apply to community colleges. Thus, the common-law rules and CCCC's adopted rules of due process govern this action.

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532, the United States Supreme Court discussed due process requirements in terms of terminating public employees who had property interests in continued employment under applicable Ohio statutes. The Court stated: "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by notice and opportunity for hearing appropriate to the nature of the case.' " 470 U.S. at 542. Due process requires a balancing of competing interests. These competing interests include "the private interest in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination." 470 U.S. at 542-43. The Court concluded by providing the following guidelines:

> "The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. [Citation omitted.] The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story. [Citations omitted.] To require more than this prior to termination would intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." 470 U.S. at 546.

CCCC's AP 6 outlines the process by which administrators' contracts may be nonrenewed. It states:

> "Administrators may be terminated or not renewed for any good cause. Whenever an administrator is to be nonrenewed or terminated, he/she shall be notified in writing in the event of nonrenewal by June 30, of the year in which the contract is to expire. Whenever an administrator is given written notice of a Board's intention to not renew or terminate the administrator's contract, the administrator may request a meeting with the Board by filing a written request therefor with the clerk of the board within ten days from the date of receipt of the written statement of nonrenewal or termination of a contract. The Board shall hold such a meeting within ten days after the filing of the administrator's request. The meeting provided for here shall be in executive session; and at such meeting, the Board shall specify the reason

or reasons for the Board's intention to not renew or terminate the administrator's contract.

"The administrator shall be afforded an opportunity to respond to the Board. Neither party shall have the right to have counsel present. Within ten days after the meeting, the Board shall reconsider its reason or reasons for nonrenewal or termination and shall make a final decision as to the matter."

Although the state's Administrators' Act does not control the actions taken by community colleges, AP 6 is modeled after K.S.A. 1991 Supp. 72-5452 and K.S.A. 72-5453. K.S.A. 1991 Supp. 72-5452 provides:

"Written notice of a board's intention to not renew the contract of employment of an administrator shall be given to the administrator on or before April 10 of the year in which the term of the administrator's existing contract expires. An administrator shall give written notice to the board on or before May 10 of the administrator's rejection of renewal of the contract of employment. Terms of a contract may be changed at any time by mutual consent of both the administrator and the board."

K.S.A. 72-5453 states:

"(a) Whenever an administrator is given written notice of a board's intention to not renew the administrator's contract, the administrator may request a meeting with the board by filing a written request therefor with the clerk of the board within 10 days from the date of receipt of the written statement of nonrenewal of a contract.

> "(b) The board shall hold such meeting within 10 days after the filing of the administrator's request. The meeting provided for under this section shall be held in executive section and, at such meeting, the board shall specify the reason or reasons for the board's intention to not renew the administrator's contract. The administrator shall be afforded an opportunity to respond to the board. Neither party shall have the right to have counsel present. Within 10 days after the meeting, the board shall reconsider its reason or reasons for nonrenewal and shall make a final decision as to the matter."

Chief Judge Earl E. O'Connor of the Kansas federal district court had the opportunity to consider the constitutionality of the procedure required by K.S.A. 72-5452 and 72-5453 in *Peterson v. United School Dist. No. 418*, 724 F. Supp. 829 (D. Kan. 1989). In *Peterson*, a former school principal brought an action challenging nonrenewal of his contract and claiming the school district had violated his civil rights under 42 U.S.C. § 1983. After considering constitutional principles, including those stated in *Cleveland Board of Education v. Loudermill*, Chief Judge O'Connor concluded the Administrators' Act procedures were constitutional. Chief Judge O'Connor wrote:

> "We are persuaded that the procedures provided in K.S.A. 72-5452 and K.S.A. 72-5453 sufficiently protect the property interests of school administrators. The requirement that the school board specify the reasons for its intent not to renew discourages unlawful or arbitrary action. Since administrators not only have the opportunity to request a hearing but also the opportunity to respond to the reason provided for

> nonrenewal, we believe the process is fundamentally fair." 724 F. Supp. at 834.

Although *Peterson* is not controlling upon this court, we find it persuasive and agree that the Administrators' Act adequately protects administrators' property interests. That being true, it follows that AP 6 protects Dr. Kosik's property right. Let us now consider whether the Board complied with AP 6.

First, on May 15, 1989, Dr. Douglass presented to the Board information, memos, and notes from dissatisfied faculty members. Swensen, the Board's attorney, also gave the Board information he had gathered by interviewing 6 to 8 faculty members on April 5, 1989. In addition, at least one Board member brought copies of letters of complaint he had received. After reviewing this information, the Board voted to send Dr. Kosik notice of intent to nonrenew his contract for the 1989-90 academic year.

On May 22, 1989, Dr. Kosik wrote the Board requesting an opportunity to meet with the Board. At Dr. Kosik's request, the meeting was set for more than 10 days after receiving his request. Neither Dr. Kosik nor the Board had counsel present at this meeting held June 6, 1989. During executive session, Leo Dreiling read the following statement and list of reasons for nonrenewal to Dr. Kosik.

> "Dr. Kosik, I am now furnishing you with a written list of the reasons upon which the Board made its decision to issue to you its written notice of intention not to renew your contract for the next school year. The reasons are as follows:

"1. Conduct demonstrating lack of proper professional and personal respect towards staff and students causing resentment and offense.

"2. Refusal to foster working relationships with college staff in an effort to enhance the overall learning atmosphere of the LRC and achieve harmony in the use of the LRC among students, staff and LRC personnel.

"3. Rigid and inappropriately harsh enforcement of LRC rules causing resentment among staff and students and unnecessary inaccessibility to needed materials and equipment.

"4. Public swearing and abusive conduct towards staff and students.

"5. Inappropriate and offensive conduct which has alienated a number of college faculty members to a point that they avoid the use of the LRC, giving student assignments requiring use of the LRC and any contact whatsoever by the faculty or students with Dr. Kosik.

"6. Inappropriate and offensive conduct towards students causing some students to be uncomfortable about or even to avoid using the LRC.

"7. Offensive and inappropriate conduct resulting in the underutilization of the LRC to the detriment of the college, its faculty and students.

"8. Termination of a support staff employee without the requisite administration approvals in violation of Board policies.

"9. Termination of support staff employee knowingly in direct contradiction of administration intentions and desires.

> "You are entitled to have an opportunity to respond to the above charges. You may either make an oral response at this time, or you may make your response in writing before the Board meets to reconsider its reasons and your responses. The Board will meet on June 15, 1989, to reconsider its reasons for nonrenewal of your contract and to make a final decision as to the matter. You will be notified of the Board's final decision within a few days thereafter.
>
> "Would you like to make a statement of response at this time, or would you prefer to respond in writing to the reasons?"

Dr. Kosik then was given an opportunity to respond to the nine reasons. He took almost an hour for his presentation. Once Dr. Kosik concluded and left the executive session, two of his assistants from the LRC testified in his behalf to the Board. After the presentation the Board removed items 8 and 9 from the list of reasons for nonrenewal.

On June 9, 1989, Dr. Kosik fortified his testimony with a three-page letter to the Board president with copies to each Board member. The letter states in part: "My initial reaction to the 'Reasons' remains unchanged: they in no way constitute evidence and are merely tediously repetitious and totally unfounded malevolent fabrications and willful misrepresentations."

Janine Johnson, one of the LRC staff faculty members, also wrote a letter to the Board after the June 6, 1989, meeting. The letter was supportive of Dr. Kosik.

Prior to the Board's final decision on June 16, 1989, the Board took a tour of the LRC. Following the tour, the Board voted to nonrenew Dr. Kosik's contract.

Essentially, Dr. Kosik's objections to the due process afforded him center upon the methods and actions of the Board in conducting the hearing and making its decision. He first complains that Board member Lloyd Erickson testified he had made his decision to nonrenew Dr. Kosik's contract prior to the June 6, 1989 meeting. He also complains that Leo Dreiling considered complaints he had heard against Dr. Kosik prior to his being elected to the Board when Dreiling voted to nonrenew Kosik's contract.

Issues similar to these raised by Dr. Kosik were considered by this court in *Kelly v. Kansas City, Kansas Community College*, 231 Kan. 751, 648 P.2d 225 (1982), in which we considered nonrenewal of tenured teachers. There, we stated: "Unless authorized by statute, an administrative body performing a quasi-judicial function is not subject to inquiry concerning its mental processes in reaching a decision." 231 Kan. 751, Syl. ¶ 2.

Here, there is no statutory authorization for inquiring into the mental process of the board; thus, such inquiry is improper. We hold this argument to be meritless.

Lastly, Dr. Kosik argues the vote of the Board to nonrenew his contract was improper. Four of the six board members voted to nonrenew the contract. Dr. Kosik contends Board member Robert Champlin's vote should not be counted because he did not attend the June 6 hearing. It is noted that Champlin was sent a copy of Dr. Kosik's letter to Leo Dreiling in which he set forth his

response to the Board's reasons for his nonrenewal. Furthermore, Champlin attended the June 16, 1989, meeting where the Board discussed the issue of Kosik's nonrenewal prior to voting.

A similar argument was made in *Kelly*. We held the risk of a wrongful deprivation of due process increases where board members neither attend the hearing nor read the entire record thereof but the risk is lessened where some members read the hearing record and the issues are thoroughly presented, argued, and discussed before a vote is taken. *Kelly*, 231 Kan. at 761. We hold the presumption of regularity of a Board's action was not overcome by Dr. Kosik's evidence, and thus due process requirements were satisfied.

We hold the procedure adopted by the Board does not violate due process. Dr. Kosik was afforded notice of nonrenewal. He was provided a list of reasons for nonrenewal and a hearing before the Board to attempt to refute those reasons orally and in writing. Moreover, Dr. Kosik was permitted to call witnesses in his behalf. The Board then met and reconsidered its intention to nonrenew and decided Dr. Kosik's evidence did not persuade it to renew his contract. Because the Board properly followed its adopted due process procedure, we hold Dr. Kosik was afforded the due process required in this case.

The facts surrounding the procedure used by the Board in nonrenewing Dr. Kosik's contract were not in dispute. Therefore, the legal question of whether due process was afforded should have been decided by the trial court as a matter of law. The trial court erred in denying CCCC's motion for directed verdict on this issue

at the close of Dr. Kosik's case. At that time, the trial court had ample undisputed facts upon which to base its decision that the Board did not violate Dr. Kosik's right to due process.

II

Dr. Kosik in his cross-appeal questions whether sufficient evidence supports the jury's finding that CCCC had good cause to nonrenew his contract on June 16, 1989.

The duty of an appellate court when considering the sufficiency of the evidence is well established. We have stated:

> "[T]he duty of the appellate court extends only to a search of the record for the purpose of determining whether there is any competent substantial evidence to support the findings. The appellate court will not weigh the evidence or pass upon the credibility of the witnesses. Under these circumstances, the reviewing court must review the evidence in the light most favorable to the party prevailing below." *Lambeth v. Levens*, 237 Kan. 614, 622, 702 P.2d 320 (1985).

We have previously discussed much of the information the Board possessed on June 16, 1989, when it voted to nonrenew Dr. Kosik's contract. This information was introduced at trial. It showed Dr. Douglass had presented memos and letters of complaint to the Board on May 15, 1989. At the same meeting David Swenson provided the Board with information he had gathered by interviewing six to eight faculty members. Several Board members

testified they had received complaints from students, parents, and faculty over a period of time. Keith Christensen brought photocopies of complaints he had received to the May 15, 1989, meeting.

After reviewing the evidence, we find substantial evidence to support the jury's finding that good cause existed to nonrenew Dr. Kosik's contract.

III

Dr. Kosik's final issue on cross-appeal is whether, as a matter of law, good cause existed to nonrenew his contract.

Dr. Kosik claims the Board lacked good faith and acted irrationally when voting to nonrenew his contract and, therefore, the Board's action can be ruled invalid as a matter of law. Dr. Kosik cites *Gillett v. U.S.D. No. 276*, 227 Kan. 71, 605 P.2d 105 (1980), which involved the nonrenewal of a teacher's contract. We held:

> "[U]nder the Kansas due process statute (K.S.A. 1977 Supp. 72-5436 et seq.) a tenured teacher may be terminated or nonrenewed only if good cause is shown, including any ground which is put forward by the school board in good faith and which is not arbitrary, irrational, unreasonable, or irrelevant to the school board's task of building up and maintaining an efficient school system." 227 Kan. at 78.

We agree with the rule stated in *Gillett*, but disagree with Dr. Kosik's portrayal of the Board's actions. After a review of the evidence, we hold the Board acted in good faith. The issue of whether the Board had good cause to

nonrenew Dr. Kosik's contract was a question of fact determined by the jury.

IV

Our decision on the issue of due process makes all other issues moot. The jury verdict on breach of contract and the coverage of the master teacher contract of the CCCC were not appealed and, therefore, are not before this court and must stand. Because we have found the Board did not violate Dr. Kosik's due process rights, coupled with the jury determination there was no breach of contract and that the master contract did not apply, there remains no basis upon which Dr. Kosik can be awarded relief.

The judgment of the trial court is reversed on the due process issue. The awards of attorney fees, damages, and other relief to Dr. Kosik are set aside. The judgment is affirmed on all other issues.

IN THE DISTRICT COURT OF
CLOUD COUNTY, KANSAS

| | | |
|---|---|---|
| DR. FRANK P. KOSIK, Plaintiff, | ) | |
| vs. | ) | Case No. |
| CLOUD COUNTY COMMUNITY COLLEGE, Defendant. | ) | 90 C 06 |

(Proceedings Pursuant to Chapter 60)

JOURNAL ENTRY OF JUDGMENT

(Filed Feb. 11, 1991)

This matter came before the Court for jury trial commencing on Monday, January 21, 1991. Plaintiff appeared personally and by his attorneys, Terry D. Criss and David D. Moshier of Hampton, Royce, Engleman and Nelson. Defendant appeared by its President, Dr. James P. Ihrig, by its Dean of Instruction, Dr. James E. Douglass, and by its attorneys, Stephen J. Dennis and Gregory W. Bruning. There were no other appearances.

WHEREUPON, on day one of the trial, the Court heard the parties' motions in limine in chambers and issued its rulings thereon. Thereafter, a panel of eighteen prospective jurors was impaneled and after voir dire examination by counsel, same was passed for cause. A panel of three alternate jurors was selected and passed

for cause after voir dire examination. The parties exercised their peremptory challenges to the prospective jurors and a jury consisting of twelve members and one alternate juror was impaneled and sworn. Thereafter, counsel for Plaintiff and Defendant gave their opening statements, and presentation of Plaintiff's case in chief commenced.

At the conclusion of the third day of the trial, Plaintiff's counsel indicated that all of Plaintiff's evidence had been presented. with the exception of the testimony of two subpoenaed witnesses who were ill.

WHEREUPON, commencing on the fourth day of the trial, Defendant presented its case in chief. After presentation of deposition testimony from one of Plaintiff's absent witnesses, Plaintiff rested. Subsequently, Defendant rested. Counsel for the parties were heard in chambers by the Court. Defendant made its motion for directed verdict as of the close of Plaintiff's case in chief and the conclusion of presentation of all evidence. Plaintiff made his motion for directed verdict as of the conclusion of presentation of all evidence and also renewed his motion for summary judgment on the due process issue. All motions for directed verdict and Plaintiff's summary judgment motion were denied. Thereupon, the Court conducted an informal instruction conference.

WHEREUPON, on the fifth day of the trial, a formal instruction conference was held. All objections to the instructions proposed by the Court were overruled. The instructions were read to the jury, and after closing arguments by counsel for the parties, the jury retired to

deliberate. In response to the following special writter interrogatories, the jury stated:

1. Was Plaintiff Dr. Kosik's employment for the 1988-1989 academic year covered by the Master Contract?
   No. (11 jurors in agreement)

2. On June 16, 1989, did the Board of Trustees of Defendant Cloud County Community College have good cause to nonrenew Dr. Kosik's contract?
   Yes. (11 jurors in agreement)

3. Did the College breach Dr. Kosik's contract of employment when it nonrenewed him for incompetence without first evaluating him?
   No. (11 jurors in agreement)

4. Did Dr. Kosik receive due process during the nonrenewal process, which included the hearing before the Board of Trustees on June 6, 1989?
   No. (10 jurors in agreement)

5. What damages, if any, did Dr. Kosik suffer?

   | | | |
   |---|---|---|
   | A. | For lost wages and benefits to date | $40,000.00 |
   | B. | For future lost wages and benefits | 0 |
   | C. | For physical illness and emotional suffering to date | 25,000.00 |
   | D. | For future physical illness and emotional suffering | 0 |
   | | Total damages | $65,000.00 |

   (12 jurors in agreement)

The Verdict Form was signed by John G. Horkman, the presiding juror.

Upon receipt of the Verdict Form, the Clerk read same and the jury, when polled, advised that this was their verdict. A true and correct copy of the Verdict Form is attached hereto as Exhibit A.

Upon the basis of the evidence presented and the answers of the jury to the special interrogatories propounded to them, this Court finds that judgment should be entered in favor of Dr. Kosik and against Cloud County Community College by reason of Cloud County Community College's denial of Dr. Kosik's right to due process, which judgment should be in the amount of $65,000.00, together with interest as provided by K.S.A. 60-204 and the costs of this action.

The parties have twenty (20) days from January 25, 1991, to file their post-trial motions. Post-trial motions, if any, are set for hearing at 9:30 A.M. on March 1, 1991, unless a special setting for hearing on any such motion is obtained.

IT IS SO ORDERED!

/s/ Thomas M. Tuggle
Thomas M. Tuggle
District Court Judge

CERTIFICATE OF THE CLERK
OF THE DISTRICT COURT

The above is a true and correct copy of the original instrument filed on the 11th day of February, 1991, and recorded in this Court, the Twelfth Judicial District, Concordia, Cloud

County, Kansas. Done this 23 day of May , 1991.

CLERK OF THE DISTRICT COURT

By /s/ Trish Bishop , Deputy

SUBMITTED AND APPROVED BY:

/s/ Terry Criss
David D. Moshier, #09477, and
Terry D. Criss, #13167, of
HAMPTON, ROYCE, ENGLEMAN & NELSON
United Building, Ninth Floor
119 West Iron Avenue
P.O. Box 1247
Salina, Kansas 67402-1247
(913) 827-7251

Attorneys for Plaintiff
Dr. Frank P. Kosik

/s/ Stephen J. Dennis
Stephen J. Dennis, #12453, and
Gregory W. Bruning, #14395, of
NIEWALD, WALDECK & BROWN
9401 Indian Creek Parkway
40 Corporate Woods, Suite 550
P.O. Box 25790
Overland Park, Kansas 66225
(913) 451-1717

Attorneys for Defendant
Cloud County Community College

IN THE DISTRICT COURT
OF CLOUD COUNTY, KANSAS

DR. FRANK P. KOSIK, Plaintiff,

vs. Case No. 90 C 06

CLOUD COUNTY
COMMUNITY COLLEGE Defendant.
(Filed Jan. 25, 1991)

## VERDICT

We, the Jury, present the following answers to the following questions:

(1) Was Plaintiff Dr. Kosik's employment for the 1988-1989 academic year covered by the Master Contract?

Yes ___ No X

(Number of jurors in agreement
10 ___ 11 X 12 ___)

(2) On June 6, 1989, did the Board of Trustees of Defendant Cloud County Community College have good cause to nonrenew Dr. Kosik's contract?

Yes X No ___

(Number of jurors in agreement
10 ___ 11 X 12 ___)

(3) Did the College breach Dr. Kosik's contract of employment when it nonrenewed him for incompetence without first evaluating him?

Yes ___ No X

(Number of jurors in agreement
10 ___ 11 X 12 ___)

(4) Did Dr. Kosik receive due process during the nonrenewal process, which included the hearing before the Board of Trustees on June 6, 1989?

Yes ___ No X

(Number of jurors in agreement
10 ___ 11 X 12 ___)

NOTE: If you answer "NO" to Question (1) and Question (3) and "Yes" to Question (2) and Question (4), your deliberations are completed and you need not answer any further questions. If you answered "YES" to Question (1) or question (3) or "NO" to Question (2) or Question (4), proceed to Question (5).

(5) What damages, if any, did Dr. Kosik suffer?

| | | |
|---|---|---|
| A. | For lost wages and benefits to date | $ 40,000 |
| B. | For future lost wages and benefits | $ 0 |
| C. | For physical illness and emotional suffering to date | $ 25,000 |
| D. | For Future physical illness and emotional suffering | $ 0 |
| | Total damages | $ 65,000 |

(Number of jurors in agreement
10 ___ 11 ___ 12 X )

/s/ John G. Horkman
Presiding Juror

HAMPTON, ROYCE, ENGLEMAN & NELSON
United Building, Ninth Floor
119 West Iron Avenue
P.O. Box 1247
Salina, Kansas 67402-1247
(913) 827-7251

IN THE DISTRICT COURT
OF CLOUD COUNTY, KANSAS

| | | |
|---|---|---|
| DR. FRANK P. KOSIK,<br>Plaintiff,<br>v.<br>CLOUD COUNTY COMMUNITY COLLEGE,<br>Defendant. | ) | Case No. 90 C 06 |

(Proceedings Pursuant to K.S.A. Chapter 60)

JOURNAL ENTRY OF JUDGMENT
(Filed Apr. 25, 1991)

On the 27th day of March, 1991, the Court heard Plaintiff's Motion for Attorney Fees and Plaintiff's Motion for Reinstatement and/or Additur. Plaintiff, Dr. Frank P. Kosik ("Dr. Kosik") appeared by Terry D. Criss, of Hampton, Royce, Engleman & Nelson. Defendant, Cloud County Community College ("CCCC") appeared by Stephen J. Dennis, of Niewald, Waldeck and Brown, by David D. Swenson, of Paulsen, Buechel, Swenson, Uri & Brewer, and by its President, Dr. James P. Ihrig.

WHEREUPON, the Court, having reviewed the briefs submitted by the parties, having heard the arguments of

counsel, and being otherwise duly advised in the premises, entered the following orders.

Dr. Kosik's Motion for Attorney's Fees

The Court finds that Dr. Kosik was the prevailing party in this action under 42 U.S.C. §1983, that this action was essentially one for wrongful termination of employment; that all of the claims brought by Dr. Kosik arose from a common core of facts, and that the contract claims set forth by Dr. Kosik were substantially related to his due process claims. Therefore, there should be no abatement or reduction of the attorney fees sought by Dr. Kosik on the basis of the grounds asserted by CCCC. Plaintiff has recovered a substantial judgment, and considering the action in its overall context, Plaintiff was very successful.

WHEREUPON, the Court announces that it has considered the Loadstar factors listed in *Blanchard v. Bergeron*, 489 U.S. 87, 103 L.Ed. 2d 67, 109 S.Ct. 939 (1989), and as to each of the factors finds:

(1) *Time and Labor Required*: Counsel for Dr. Kosik were required to spend hundreds of hours on this action. This was a complex case requiring significant legal research. Additionally, Dr. Kosik's counsel were forced to incur additional time and expenses, due to CCCC's refusal to allow informal interviews of its employees;

(2) *Novelty and Difficulty of Questions*: Constitutional law questions are always complex. The Court compliments counsel for both parties for their skillfulness in briefing, litigating, and arguing this action;

(3) *Skill Requisite to Perform Legal Service Properly*: Dr. Kosik's counsel have demonstrated a high degree of skill and professional competence in performing services for their client;

(4) *Preclusion of Other Employment by Attorneys Due to Acceptance of Case*: The Court finds that nothing indicates that Dr. Kosik's counsel were precluded from accepting other employment due to this action;

(5) *Customary Fee*: The charges by Terry D. Criss, ranging from $60.00 per hour to $80.00 per hour are reasonable. However, the charges for David D. Moshier should not exceed $100.00 per hour. Within the 12th Judicial District, the customary fee for an attorney of Mr. Moshier's experience, skill and reputation is approximately $90.00 per hour, therefore Mr. Moshier's fees should be limited to $100.00 per hour;

(6) *Whether Fee is Fixed or Contingent*: The fee charged to Dr. Kosik was a fixed fee, based on time and expense;

(7) *Time Limitations Imposed by Client or Circumstances*: The Court finds that there were no circumstances which imposed unusual or stressful time limits upon counsel for Plaintiff;

(8) *Amount Involved and Results Obtained*: As stated above, the Court finds that the result obtained in this action is favorable to Dr. Kosik. He has recovered a substantial judgment, and in the overall context of his action was very successful;

(9) *Experience, Reputation and Ability of Attorneys:* David D. Moshier and Terry D. Criss both are well qualified in their experience, reputation and ability. Mr. Moshier especially enjoys

an excellent reputation in the field of wrongful termination cases, with previous litigation experience;

(10) *Undesirability of Case:* There is no indication that this case was undesirable for Dr. Kosik's counsel, as they are located in Salina;

(11) *Nature and Length of Professional Relationship With Client:* Counsel have not previously represented Dr. Kosik; and

(12) *Awards in Similar Cases:* Based on similar cases within the 12th Judicial Circuit and the State of Kansas, the hourly rate sought by Dr. Kosik's counsel is reasonable, given the extent of success they have enjoyed in this action.

THEREFORE, the Court orders that Dr. Kosik should have judgment in his favor and against Cloud County Community College for the costs of this action, as sought in Dr. Kosik's Motion for Attorney Fees and Supplemental Motion for Attorney Fees, adjusted as follows:

| | | |
|---|---|---|
| Attorney Fees Requested | $30,173.50 | |
| Adjustment for Mr. Moshier's Fees 74.5 hours reduced to $100 per hour | (745.00) | |
| Eliminate Legal Assistant time on January 10 and 11, 1991 | (250.00) | |
| Add 5 hours at $80 for hearing on pretrial motions | 400.00 | |
| Attorney Fees Allowed | | $29,578.50 |
| Attorney Expense | | 1,444.73 |
| Docket Fee | | 55.00 |

| | |
|---|---|
| Witness Fees for Depositions and trial | 303.92 |
| Deposition Expenses Allowed for depositions used as evidence | |
| Gwen Whitney | 112.10 |
| Lloyd Erickson | 170.10 |
| Total Attorney Fee and Expense Allowed | $31,664.35 |

Dr. Kosik's Motion for Reinstatement and/or Additur

The Court finds that there has been a violation of 42 U.S.C. §1983 in connection with the nonrenewal of Dr. Kosik's contract. Since this wrongful termination action seeks relief under federal statute, it is appropriate to look at federal decisions to determine the appropriate relief. The Court, having examined same, finds that reinstatement is a basic element when a Plaintiff's due process rights are violated in an employment context. In this case, there are no exceptional circumstances which automatically preclude reinstatement.

The Court notes that the evidence is undisputed that Dr. Kosik is an excellent technical librarian. The evidence presented at trial indicates that CCCC's primary concerns are Dr. Kosik's lack of "people skills." However, it is also noted that some individuals seemed to get along with Dr. Kosik, while others were always unable to do so.

The Court notes that although additur is not normally proper, the Court does not consider the relief granted herein to be a form of additur. Rather, the Court is exercising its powers to award such equitable relief as

will make the Plaintiff whole, as if the violation of his due process rights had never occurred.

THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that the jury's verdict of $65,000.00, representing Dr. Kosik's lost wages and pain and suffering through January 25, 1991 is reaffirmed by this Court; that in addition to the jury's verdict, Dr. Kosik is entitled to additional back pay, and to either reinstatement or front pay through the date of his retirement. Accordingly, the Court orders that within ten (10) days after the date this Journal Entry of Judgment is entered, CCCC must file a written notice electing to either:

> (a) Reinstate Dr. Kosik to his former position with full pay and fringe benefits as if he had been continuously employed; or
>
> (b) Pay Dr. Kosik the amount of wages and benefits he would earn, if reinstated, from the date CCCC's written election is filed until the last day of July, 1993; and
>
> (c) In any event, to pay Dr. Kosik the amount of wages he would have earned from and after January 25, 1991, through the date CCCC makes its above-required election.

The Court finds that Plaintiff's Exhibit 33, which was uncontradicted by Defendant at trial, accurately represents the expected wages and fringe benefits Dr. Kosik would have earned had he been continuously employed by Cloud County Community College. Accordingly, all wage calculations shall follow its requirements.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that Dr. Frank P. Kosik is entitled to judgment

against Cloud County Community College for the following:

A. $65,000.00 as provided by the jury's verdict and the prior journal entry of this Court;

B. Attorney fees and expenses pursuant to 42 U.S.C. 1988 in the amount of $31,664.35;

C. (1) reinstatement as the Director of the Learning Resources Center of Cloud County Community College, with full pay and fringe benefits, as if he had been continuously so employed; or

(2) future wages through the end of the 1992-1993 academic year

as elected by Cloud County Community College, said election to be filed, in writing , with this Court within 10 days after the entry hereof;

D. for back pay and fringe benefits, at the rates shown by Plaintiff's Exhibit 33, for the period January 25, 1991 through the date of reinstatement or payment of future wages; and

E. for interest at the statutory rate.

IT IS SO ORDERED!

/s/ Thomas M. Tuggle
Thomas M. Tuggle
District Court Judge

SUBMITTED AND APPROVED BY:

/s/ Terry D. Criss
Terry D. Criss, #13167, of
HAMPTON, ROYCE, ENGLEMAN & NELSON
Ninth Floor – United Building
119 West Iron Avenue
P.O. Box 1247
Salina, Kansas 67402-1247
(913) 827-7251
Attorneys for Plaintiff
Dr. Frank P. Kosik

/s/ Stephen J. Dennis
Stephen J. Dennis, #12453, of
NIEWALD, WALDECK AND BROWN
9401 Indian Creek Parkway
40 Corporate Woods, Suite 550
P.O. Box 25790
Overland Park, Kansas 66225
(913) 451-1717
Attorneys for Defendant
Cloud County Community College

HAMPTON, ROYCE, ENGLEMAN & NELSON
United Building, Ninth Floor
119 West Iron Avenue
P.O. Box 1247
Salina, Kansas 67402-1247
(913) 827-7251

IN THE DISTRICT COURT
OF CLOUD COUNTY, KANSAS

| | | |
|---|---|---|
| DR. FRANK P. KOSIK,<br>Plaintiff,<br>v.<br>CLOUD COUNTY COMMUNITY COLLEGE,<br>Defendant. | ) | Case No. 90 C 06 |

(Proceedings Pursuant to K.S.A. Chapter 60)

JOURNAL ENTRY OF JUDGMENT
(Filed Apr. 25, 1991)

On the 27th day of March, 1991, the Court heard the respective Motions for Judgment Notwithstanding the Verdict filed by the parties to this action. Plaintiff, Dr. Frank P. Kosik ("Dr. Kosik") appeared by Terry D. Criss, of Hampton, Royce, Engleman & Nelson. Defendant, Cloud County Community College ("CCCC") appeared by Stephen J. Dennis, of Niewald, Waldeck and Brown, by David D. Swenson, of Paulsen, Buechel, Swenson, Uri & Brewer, and by its President, Dr. James P. Ihrig.

CCCC's Motion for Judgment Notwithstanding the Verdict

WHEREUPON, the Court, having previously reviewed the Motion for Judgment Notwithstanding the Verdict and accompanying Memorandum Brief filed by CCCC, and Dr. Kosik's response to CCCC's motion, heard the arguments of counsel with regard to CCCC's Motion for Judgment Notwithstanding the Verdict.

WHEREUPON, the Court finds that there was abundant evidence presented to the jury that the manner in which AP6 was administered deprived Dr. Kosik of minimum fundamental fairness required by due process, and therefore, the Court overruled CCCC's Motion for Judgment Notwithstanding the Verdict, or in the Alternative, for New Trial.

The Court further overruled the each and every other basis of CCCC's Motion for New Trial, as same related to Instructions given by the Court or not given by the Court, stating that the Court properly instructed the jury in this action.

Dr. Kosik's Motion for Judgment Notwithstanding the Verdict

WHEREUPON, the Court having previously reviewed the Motion for Judgment Notwithstanding the Verdict and accompanying briefs submitted by Dr. Kosik, as well as the reply brief submitted by CCCC heard the arguments of counsel on said motion.

WHEREUPON, the Court finds that sufficient evidence was presented upon which the jury reasonably

could have concluded that good cause existed, and therefore, the Court overruled Dr. Kosik's Motion for Judgment Notwithstanding the Verdict.

IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that the Motion for Judgment Notwithstanding the Verdict filed by CCCC is overruled.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that the Motion for Judgment Notwithstanding the Verdict filed by Dr. Kosik is overruled.

DATED this 25 day of April, 1991.

/s/ Thomas M. Tuggle
Thomas M. Tuggle
District Court Judge

SUBMITTED AND APPROVED BY:

/s/ Terry D. Criss
Terry D. Criss, #13167, of
HAMPTON, ROYCE, ENGLEMAN & NELSON
Ninth Floor – United Building
119 West Iron Avenue
P.O. Box 1247
Salina, Kansas 67402-1247
(913) 827-7251
Attorneys for Plaintiff
Dr. Frank P. Kosik

/s/ Stephen J. Dennis
Stephen J. Dennis, #12453, of
NIEWALD, WALDECK AND BROWN
9401 Indian Creek Parkway
40 Corporate Woods, Suite 550
P.O. Box 25790
Overland Park, Kansas 66225
(913) 451-1717
Attorneys for Defendant
Cloud County Community College

CERTIFICATE OF THE CLERK OF THE DISTRICT COURT

The above is a true and correct copy of the original instrument filed on the 25 day of April, 1991, and recorded in this court, the Twelfth Judicial District, Concordia, Cloud County, Kansas. Done this 23 day of May, 1991

CLERK OF THE DISTRICT COURT

By /s/ Trish Bishop, Deputy

IN THE DISTRICT COURT OF
CLOUD COUNTY, KANSAS

DR. FRANK P. KOSIK,
Plaintiff,

vs.

CLOUD COUNTY
COMMUNITY COLLEGE,
Defendant, Case No. 90-C-06.

ORDER ALLOWING ADDITIONAL ATTORNEYS' FEES

On this 29th day of May, 1991, judgment is entered as follows: The motion of plaintiff, Dr. Frank P. Kosik, for additional attorneys' fees pursuant to 42 U.S.C. § 1988 for the time period May 3, 1991, through May 15, 1991, inclusive, in the amount of One Thousand One Hundred Eighty Seven Dollars and Ninety One Cents ($1,187.91) (including out-of-pocket expenses) incurred in connection with the motion of defendant, Cloud County Community College, for reconsideration which was denied on May 15, 1991, are reasonable and they are hereby allowed.

ORIGINAL SIGNED
BY
THOMAS M. TUGGLE
JUDGE OF THE
DISTRICT COURT

Thomas M. Tuggle
District Judge

CERTIFICATE OF MAILING

I certify that on the 29th day of May, 1991, I mailed true and correct copies of the foregoing Order by depositing the same in the United States Mail, postage prepaid, to each of the following persons:

Mr. Terry D. Criss
HAMPTON, ROYCE, ENGLEMAN & NELSON
United Building, Ninth Floor
119 West Iron Avenue
P.O. Box 1247
Salina, Kansas 67402-1247

Mr. Stephen J. Dennis
NIEWALD, WALDECK AND BROWN
40 Corporate Woods
Suite 550
9401 Indian Creek Parkway
P.O. Box 25790
Overland Park, Kansas 66225

/s/
Jo Anne Rice
Administrative Assistant

SUPREME COURT ORDER DISTRICT CASE NO. 90C6

IN THE SUPREME COURT

OF THE STATE OF KANSAS

TERRY D CRISS
HAMPTON ROYCE ENGLEMAN & NELSON
UNITED BLDG 9TH FLOOR
P O BOX 1247
SALINA KS 67402-1247

DR. FRANK P. KOSIK, APPELLEE,
V NO. 91-66665-AS
CLOUD COUNTY COMMUNITY COLLEGE, APPELLANT.

YOU ARE HEREBY NOTIFIED OF THE FOLLOWING ACTION TAKEN BY THE COURT:

MOTION FOR REHEARING BY APPELLEE, DR. FRANK KOSIK. CONSIDERED BY THE COURT AND DENIED.

DATE: 04/22/92.

CAROL G. GREEN
CLERK

Supreme Court, U.S.
FILED
AUG 20 1992
OFFICE OF THE CLERK

No. 92-152

In The

# Supreme Court of the United States

October Term, 1992

DR. FRANK P. KOSIK,

*Petitioner,*

v.

CLOUD COUNTY COMMUNITY COLLEGE,

*Respondent.*

**Petition For Writ Of Certiorari To The Supreme Court Of The State Of Kansas**

## OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Stephen J. Dennis
Counsel of Record
Angela K. Green
Niewald, Waldeck & Brown
1200 Main Street, Suite 4100
Kansas City, Missouri 64105
(816) 471-7000

*Attorneys for Respondent*

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

## QUESTION PRESENTED FOR REVIEW

Whether Petitioner, who received and responded to no less than nine reasons for the non-renewal of his employment contract, is entitled to greater "pre-termination" due process protections than those enumerated by the Court in *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985).

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## STATEMENT OF THE CASE[1]

This action arises out of the nonrenewal of Petitioner's one-year contract to serve as the director of the Learning Resource Center ("LRC") at Cloud County Community College ("CCCC"), the Respondent. Petitioner's employment history with CCCC was marked by adverse commentary. Portions of Petitioner's employment history are cited in the opinion of the Kansas Supreme Court as follows:

> Dr. Kosik was formally evaluated by the Dean of Instruction, Dr. James Douglass, on August 28, 1986. Dr. Douglass acknowledged Dr. Kosik's expertise 'in the library and in all technical phases.' Dr. Douglass, however, went on to state:
>
> > Explanation: *Even though I recommended contract in June, the board was hesitant and your renewal was on a split vote. Obviously they were responding to a collection of adverse comments over a period of time.* Hopefully, comments are beginning to be favorable.
>
> In April 1987, *80 of the 600 students at CCCC signed a petition calling for a review of the appointment of Dr. Kosik* to his position of director of the LRC. At the April 20, 1987 meeting of the CCCC Board of Trustees (Board), it was recommended that the administrative staff holding administrative and administrative support contracts be reappointed with the exception of Dr. Kosik.

---

[1] Respondent adopts and incorporates the Statement of Facts compiled by the Kansas Supreme Court. *See* Petition for Writ of Certiorari, App. 2-8, 13-16. Respondent restates the salient facts above for the convenience of the Court.

> *There followed a motion to develop and present to Dr. Kosik a list of directives for changes in his conduct. The next day Dr. Kosik received the list issued by the Board, which Dr. Kosik signed.*

Petition for Writ of Certiorari, App. 3. (Emphasis added.)

Following repeated complaints from faculty and administrative personnel concerning Petitioner's performance, CCCC's Board of Trustees eventually voted not to renew Petitioner's contract for the 1989-90 academic year. As Petitioner notes, the Board sent Petitioner formal notice of nonrenewal on May 15, 1989. This notice was sent in accordance with the College's administrative personnel policies which required that written notice would be sent to the administrator.[2] The Board's policies did not require that an explanation of the reasons for nonrenewal be provided concurrently with the notice; the policies required the Board to specify its reasons at a meeting which could be called at the election of the administrator. Petitioner timely requested a meeting with the Board which was subsequently set to take place on June 6, 1989.

Petitioner received nine reasons for the Board's action; these reasons were given to the Petitioner both orally and in writing. In his Statement of the Case, Petitioner suggests that he received the "vague and ambiguous" reasons for the nonrenewal of his contract "for the

---

[2] Policy AP 6 of the Administrative Personnel Policies of the Board of Trustees of CCCC is set out verbatim in Petitioner's Statement of the Case at p. 8. This Policy is modeled after the state's Administrators' Act, K.S.A. 1991 Supp. § 72-5452, and K.S.A. § 72-5453, cited verbatim by the Kansas Supreme Court in its analysis. *See* Petition for Writ of Certiorari, App. 11.

first time" at this June 6, 1989 meeting. Petitioner ignores the fact, which was noted by the Kansas Supreme Court in its decision, that he had previously been given a list of directives by the Board which, if not followed, would result in the nonrenewal of his contract. (*See* Plaintiff's Exhibit 4A attached hereto in the Appendix at a-1.) These directives, written almost two years prior to Petitioner's termination, are strikingly similar to the reasons relied upon by the Board in reaching its decision not to renew his contract. (*Cf.* Plaintiff's Exhibit 4A and Plaintiff's Exhibit F, attached hereto in the Appendix at a-1 and a-3.) In fact, Petitioner was not surprised when he received the 1987 directives since he knew that the faculty and staff had voiced complaints about his job performance. (Tr. pp. 490-492, Kosik Testimony.)

Petitioner also disregards the fact that he was allowed to orally address the Board for nearly *one hour* after receiving notice of the reasons for the proposed nonrenewal. (Plaintiff's Exhibit 8; Tr. p. 108, Ihrig Testimony.) Although not required by CCCC's personnel policies, Petitioner was also permitted to have two fellow employees speak on his behalf at the June 6 meeting. (*See* Tr. pp. 560-61, Parker Testimony; Tr. p. 606, Johnson Testimony; Tr. p. 435, Kosik Testimony.) Further, following the meeting with the Board on June 6, Petitioner took up the Board's offer to allow a *written* response. (*See* Plaintiff's Exhibit 13, attached hereto in the Appendix at a-5; Tr. pp. 505-506, Kosik Testimony.) Significantly, in his written response to the reasons for nonrenewal, Petitioner made the following critical concession:

> *"I will not deal with the reasons 1 to 7. They have been amply dealt with by Mrs. Johnson and Mrs. Parker."*

*Id.* After receiving this written response, and prior to any final decision on the renewal of Petitioner's contract, members of the Board toured the LRC with Petitioner for about 45 minutes. (Plaintiff's Exhibit 9, Tr. pp. 506-507, Kosik Testimony.) It was only after these "opportunities to respond" that the Board made its final decision not to renew Petitioner's contract. (Tr. pp. 349-352, Dreiling Testimony.) Petitioner's response to the Board was also partially effective since the Board later deleted Items 8 and 9 from the list of reasons stated for not renewing the contract. (Tr. pp. 509-510, Kosik Testimony.)

Based upon the testimony of numerous witnesses at trial, the jury found that CCCC had good cause not to renew Petitioner's contract. The Kansas Supreme Court affirmed the jury's verdict in this regard and reversed the trial court's finding that CCCC violated Petitioner's right to due process.

## SUMMARY OF THE ARGUMENT

Neither in any evidence cited from the record nor in any legal authorities brought to the Court's attention has Petitioner provided any justification for the board and sweeping "pre-termination" due process rights that he claims in this action. This Court has clearly articulated the due process rights of a government employee who faces termination and the process identified by this Court in *Cleveland Board of Education v. Loudermill,* 470 U.S. 532 (1985), has been duly followed by Respondent.

Petitioner's suggestion that the employer's evidence was not explained – as required by *Loudermill* – is factually incorrect since Petitioner was given no less than nine reasons which provided the basis for his impending termination. Petitioner's concomitant suggestion that "the employer's evidence be provided to the employee" stretches far beyond the *Loudermill* requirement of an "explanation of the evidence" and unnecessarily intrudes upon the government's interest in quickly removing an unsatisfactory employee.

Petitioner's contention that the Kansas Supreme Court ignored the *Loudermill* directive in its review of the case is also incorrect. After reciting each of the *Loudermill* requisites, the Kansas Supreme Court analyzed the facts and concluded:

> We hold the procedure adopted by the Board does not violate due process. Dr. Kosik was afforded notice of nonrenewal. *He was provided a list of reasons for nonrenewal* and a hearing before the Board to attempt to refute those reasons orally and in writing. . . .

Therefore, and for the reasons more fully described below, there are no special and important reasons for granting certiorari in this case. There is no unsettled federal question as suggested by Petitioner's "Question Presented," nor is there a decision which conflicts with applicable decisions of this Court. This is simply a case in which a careful review of the evidence reveals that, upon the facts presented, Petitioner's due process rights have been satisfied in a manner commensurate with explicit guidelines established by this Court. The Petition for Writ of Certiorari should be denied.

## REASONS FOR DENYING WRIT

### I. THE PROCEDURAL DUE PROCESS REQUIREMENTS ENUNCIATED IN *LOUDERMILL* HAVE BEEN MET

In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), this Court discussed the due process protections applicable to public employees who possess a property interest in continued employment. The Court stated: "An essential principle of due process is that a deprivation of life, liberty, or property 'be preceded by a notice and opportunity for hearing appropriate to the nature of the case.' " *Id.* at 542. The Court recognized that due process requires a balancing of competing interests and found that, with respect to public employment, these competing interests include "the private interest in retaining employment, the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens, and the risk of an erroneous termination." *Id.* at 542-543. The Court concluded by providing the following guidelines:

> The essential requirements of due process . . . are notice and an opportunity to respond. The opportunity to present reasons, either in person or in writing, why proposed action should not be taken is a fundamental due process requirement. The tenured public employee is entitled to oral or written notice of the charges against him, an explanation of the employer's evidence, and an opportunity to present his side of the story.

*Id.* at 546. (Citations omitted.)

Petitioner attempts to extrapolate a new requirement from the plain language used in *Loudermill*. Under the rubric of "explanation of the evidence," Petitioner stretches to conclude that an employer must actually provide the physical evidence to the employee and not merely explain the impact of the evidence on the employment decision. According to Petitioner, due process requires pretrial discovery, including production of documents and indentification of witnesses. *See* Petition for Writ of Certiorari at 11, 14. *Loudermill* does not suggest such a reach and in fact *cautions*, as noted in the very sentence following the passage set out above, that to require "more" would "intrude to an unwarranted extent on the government's interest in quickly removing an unsatisfactory employee." *Id.* For this reason, the federal courts in Kansas, and now the Kansas Supreme Court, have reviewed the Kansas statutory provisions which form the basis of CCCC's conduct in this case and concluded that these provisions, if met, pass constitutional muster under *Loudermill*. *See Peterson v. United School Dist. No. 418*, 724 F.Supp. 829 (D. Kan. 1989).

Apart from the fact that CCCC complied with a statutory scheme designed to protect constitutional rights, the independent facts of this case establish that Petitioner received all of the process due him under any standard, statutory and otherwise, and in fact received much more than "minimal" process.

Petitioner received "oral or written notice of the charges against him." On May 15, 1989, he received the Board's letter unequivocally expressing such intent.

Petitioner received itemized "explanation(s) of the employer's evidence." On June 6, 1989, Leo Dreiling of the Board read the following statement and list of nine reasons for nonrenewal of Dr. Kosik's contract:

> Dr. Kosik, I am now furnishing you with a written list of the reasons upon which the Board made its decisions to issue to you its written notice of intention not to renew your contract for the next school year. The reasons are as follows:
>
> 1. Conduct demonstrating lack of proper professional and personal respect towards staff and students causing resentment and offense.
>
> 2. Refusal to foster working relationships with college staff in an effort to enhance the overall learning atmosphere of the LRC and achieve harmony in the use of the LRC among students, staff and LRC personnel.
>
> 3. Rigid and inappropriately harsh enforcement of LRC rules causing resentment among staff and students and unnecessary inaccessibility to needed materials and equipment.
>
> 4. Public swearing and abusive conduct towards staff and students.
>
> 5. Inappropriate and offensive conduct which has alienated a number of college faculty members to a point that they avoid the use of the LRC, giving student assignments requiring use of the LRC and any contact whatsoever by the faculty or students with Dr. Kosik.
>
> 6. Inappropriate and offensive conduct towards students causing some students to be uncomfortable about or even to avoid using the LRC.

7. Offensive and inappropriate conduct resulting in the underutilization of the LRC to the detriment of the college, its faculty and students.

8. Termination of a support staff employee without the requisite administration approvals in violation of Board policies.

9. Termination of support staff employee knowingly in direct contradiction of administration intentions and desires.

This explanation was based upon evidence collected during Petitioner's six years of employment history, which included the formulation of "directives" sent by the Board to Petitioner in response to, *inter alia*, the petition of students calling for a review of Petitioner's appointment.

Finally, Petitioner was *twice* given "opportunities to respond" to the nine reasons. He took almost an hour for his presentation on June 6, 1989. Once Petitioner concluded this presentation, two of his assistants from the LRC testified on his behalf to the Board. Petitioner's response was partially effective since, after his presentation, the Board removed items 8 and 9 from the list of reasons for nonrenewal. Then, again, on June 9, 1989, Petitioner fortified his testimony with a three-page letter to the Board which contained Petitioner's concession that the first seven reasons had been neutralized by the testimony of his two assistants. Prior to the Board's final decision on June 16, 1989, the Board took a tour of the LRC. Following the tour, and after the benefit of Petitioner's oral and written responses, the Board voted not to renew Petitioner's contract.

When this case is viewed in tandem with other cases construing and applying the *Loudermill* standards, CCCC's conduct, and the process provided to the Petitioner, satisfies this Court's due process standards. For example, in *Powell v. Mikulecky*, 891 F.2d 1454 (10th Cir. 1989), the Tenth Circuit found that an informal confrontation between an employer and employee satisfied each of the *Loudermill* requirements. *Id.* at 1459. In reaching this result, the Tenth Circuit catalogued post-*Loudermill* cases which support the conclusion that due process requires only *"abbreviated"* pre-termination hearings. *Id.* at 1460.

Such a result was recently reached yet again by the Tenth Circuit in *Derstein v. State of Kansas*, 915 F.2d 1410 (10th Cir. 1990), *cert. denied*, 111 S.Ct. 1391 (1991), when a former court services officer brought a civil rights action pursuant to 42 U.S.C. § 1983 against the state and district court judges involved in his discharge. The plaintiff in *Derstein* complained that his discharge violated his liberty and property interest without due process of law. After a bench trial, the district court held that the pre-termination proceeding violated Derstein's due process rights. The Tenth Circuit Court of Appeals concluded, however, that plaintiff was provided due process and reversed.

The parties in *Derstein* agreed that the plaintiff was a "tenured" employee. The plaintiff in *Derstein* was given a one-day notice to meet with a judge in chambers. At the meeting, the judge informed plaintiff *for the first time* that an employee sought to bring a sexual harassment suit against the state because of plaintiff's actions. The judge informed plaintiff that he would have ten days to resign

or he would be terminated. At the end of the ten days, the plaintiff in *Derstein* received a termination letter. The court in *Derstein* held that the pre-termination hearing with the judge in chambers satisfied the due process requirements of *Cleveland Board of Education v. Loudermill.* The court in *Derstein* reasoned:

> At the May 6 'pre-termination hearing,' Derstein was orally informed that defendants intended to discharge him because of complaints regarding a 'long standing' problem of his alleged verbal and sexual harassment. Further, Derstein was not terminated at the meeting but given ten (10) days to respond. This meeting provided Derstein all that was necessary under *Loudermill* notice of the charges, the nature of the allegations and an opportunity to respond. . . .
>
> *A pre-termination hearing was never intended as an adjudicative detailed proceeding.*

*Id.* at 1413 (Emphasis added.)

For these reasons and by virtue of the procedures set out in CCCC's Administrative Personnel Policies, commensurate with the standards of *Loudermill,* and in the spirit of simple fairness, Petitioner received his due process.

## II. ANY FURTHER PROCEDURAL SAFEGUARDS – SUCH AS PROVIDING ACTUAL EVIDENTIARY MATERIAL TO THE EMPLOYEE OR INDENTIFYING ADVERSE WITNESSES – ARE NOT SUPPORTED BY THIS COURT'S DECISIONS OR THE POLICIES UNDERLYING THE DUE PROCESS CASES

As noted above, the form of the requisite pre-termination hearing takes its shape from a balancing of the competing interests. In *Loudermill,* the Court determined that due process required a *limited* pre-termination hearing – an informal opportunity to respond either orally or in writing as to why the proposed action should not take place. *Loudermill,* 470 U.S. 532. Only in the context of a welfare benefit has the Court demanded a more formal pre-termination hearing for the salient reason "that [the] termination of [welfare] aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." *Goldberg v. Kelly,* 397 U.S. 254, 264 (1970); *Cf. Barry v. Barchi,* 443 U.S. 55 (1979) (pre-termination opportunity to respond before suspension of license); *Mathews v. Eldridge,* 424 U.S. 319 (1976) (limited pre-termination procedure before withholding disability benefits); *Arnett v. Kennedy,* 416 U.S. 134 (1974) (partial pre-termination hearing sufficient before termination of public employment). *Loudermill,* therefore, is a consistent addition to the procedural due process analysis since it declares, quite cogently, that a public employee is entitled to an abbreviated pre-termination procedure consisting of notice and the opportunity to respond.

*Loudermill* is also consistent with the Court's prior opinions concerning public employment and due process. Almost three decades ago in *Arnett v. Kennedy,* the Court reviewed pre-termination procedures consisting of a pre-termination notice, an explanation of the employer's evidence, and an opportunity to be heard. *Arnett,* 416 U.S. at 137. In *Arnett,* Justice Powell distinguished an individual's interest in employment from that in a welfare benefit by stating:

> [T]he crucial factor [in the context of welfare benefits] – a factor not present in the case of . . . the discharged government employee . . . – is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits. By contrast, a public employee may well have independent resources to overcome any temporary hardship, and he may be able to secure a job in the private sector. Alternatively, he will be eligible for welfare benefits.

*Id.* at 169 (Powell, J., concurring in part and concurring in the result in part) (citing *Goldberg,* 397 U.S. at 261).

This Court has repeatedly stated that not all situations calling for procedural safeguards call for the same kind of procedure: "[T]he formality and procedural requisites for the hearing can vary, depending upon the importance of the interest involved and the nature of the subsequent proceedings." *See Boddie v. Connecticut,* 401 U.S. 371, 378 (1971). For this reason, Petitioner's selective reading and resulting reliance on *Brock v. Roadway Express, Inc.,* 481 U.S. 252 (1987), is misplaced.

*Brock* involved the procedural protections which are to be afforded to *an employer,* regulated by the federal government and directed by that government to rehire a formally discharged employee. In *Brock,* the Court concluded that "minimum due process for the employer *in the context presented* requires the following:

> ". . . [N]otice of the employee's allegations, notice of the substance of the relevant supporting evidence, an opportunity to submit a written response, and an opportunity to meet with the investigator and present statements from rebuttal witnesses.

*Id.* at 264.

The *Brock* decision weighs, as it must, the important policy underlying a federal statute which protects employees who suffer retaliatory discharge because they file a complaint about a motor carrier's safety violation or refuse to operate an unsafe vehicle. *See* § 405 of the Surface Transportation Assistance Act of 1982, 49 U.S.C.A. § 2305. In short, the federal statute protects "whistleblowers." In reviewing "what process is due" in the case of an *employer* directed by the government to rehire an employee, Justice Stevens notes:

> Cases dealing with the pre-termination procedures that must be made available to those deprived of employment, benefits or other forms of 'new property' are not necessarily controlling on the level of procedures required when the government exercises its classic police power to interfere with transactions and matters involving private parties.

*Brock*, 481 U.S. at 274, n. 2 (Stevens, J., concurring in part, dissenting in part). Stated conversely, *Brock* is not applicable to this case, which should be governed by the standards enunciated in *Loudermill*, discussed above.

Notwithstanding Justice Stevens' comments and even under the inapposite *Brock* standard, Petitioner received the due process described in *Brock*. As noted in detail above, Petitioner received written notice of the reasons of the Board's proposed action; Petitioner physically met with the Board to present an oral response; Petitioner submitted a written response; and, importantly, Petitioner presented "rebuttal" witnesses. Once again, to require more was specifically rejected by a majority of the Court:

> The presentation of the employer's witnesses . . need not be formal *and cross-examination of the employee's witnesses need not be afforded* . . .

*Id.* at 264 (opinion of Marshall, J., joined by Blackmun, J., Powell, J., and O'Connor, J.) (emphasis added); *see also Id.* at 271 (concurring and dissenting opinion of White, J., joined by Rehnquist, C.J., and Scalia, J.). Therefore, any suggestion that actual evidentiary materials or indentification of witnesses be provided as a part of the "process due" is not supportable.

## CONCLUSION

For these reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

STEPHEN J. DENNIS
Counsel of Record
ANGELA K. GREEN
NIEWALD, WALDECK & BROWN
1200 Main Street, Suite 4100
Kansas City, Missouri 64105
(816) 471-7000

*Attorneys for Respondent*

[PLAINTIFF'S EXHIBIT 4A]

To: Dr. Frank P. Kosik
From: Dr. James P. Ihrig
Dated: April 21, 1987

DIRECTIVES

*You are hereby given the following directives:*

The following conditions shall be complied with and accomplished as soon as reasonably possible:*

1. You will submit all LRC policies immediately to the Administration for review, and comply with revisions made.

2. You will cooperate with college staff and students as necessary to enhance the overall learning atmosphere, and otherwise direct the LRC in such a manner as is needed to foster and achieve harmony in the use of the LRC among students, staff and LRC personnel.

3. You will at all times deal with college personnel, students, and other LRC users in a courteous and respectful manner.

4. You will seek acceptance of and compliance with LRC policies through polite diplomacy, rather than personal confrontation.

5. Those who may breach policies of the LRC shall nevertheless be treated with politeness, as appropriate for achieving compliance, but in a professional manner.

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* This clause was crossed out in the original; the language in italics was handwritten over this clause.

6. Under no circumstances will you use profane or derogatory language, or otherwise conduct yourself so as to emotionally injure or offend another in connection with your job-related responsibilities.

7. You will not discriminate against any user of the LRC on the basis of race, color, creed, sex or handicapped status.

If you fail to comply with the above directives, it will not be possible to maintain you as director of the LRC.

RECEIPT

The above was received by me on April 21, 1987.

/s/ Dr. Frank P. Kosik
Dr. Frank P. Kosik

[PLAINTIFF'S EXHIBIT 7]

## ADMINISTRATOR'S MEETING WITH BOARD PURSUANT TO NOTICE OF NONRENEWAL

The Board of Trustees of Cloud County Community College is now sitting in executive session pursuant to a written request filed by Dr. Frank Kosik subsequent to a written notice of the Board's intention to not renew his contract with Cloud County Community College for the 1989-1990 school year. Neither the Board nor Dr. Kosik have the right to have counsel present.

Dr. Kosik, I am now furnishing you with a written list of the reasons upon which the Board made its decision to issue to you its written notice of intention not to renew your contract for the next school year. The reasons are as follows:

1. Conduct demonstrating lack of proper professional and personal respect towards staff and students causing resentment and offense.

2. Refusal to foster working relationships with college staff in an effort to enhance the overall learning atmosphere of the LRC and achieve harmony in the use of the LRC among students, staff and LRC personnel.

3. Rigid and inappropriately harsh enforcement of LRC rules causing resentment among staff and students and unnecessary inaccessibility to needed materials and equipment.

4. Public swearing and abusive conduct towards staff and students.

5. Inappropriate and offensive conduct which has alienated a number of college faculty members to a point

that they avoid the use of the LRC, giving student assignments requiring use of the LRC and any contact whatsoever by the faculty or students with Dr. Kosik.

6. Inappropriate and offensive conduct towards students causing some students to be uncomfortable about or even to avoid using the LRC.

7. Offensive and inappropriate conduct resulting in the underutilization of the LRC to the detriment of the college, its faculty and students.

8. Termination of a support staff employee without the requisite administration approvals in violation of Board policies.

9. Termination of support staff employee knowingly in direct contradiction of administration intentions and desires.

You are entitled to have an opportunity to respond to the above charges. You may either make an oral response at this time, or you may make your response in writing before the Board meets to reconsider its reasons and your responses. The Board will meet on June 15, 1989, to reconsider its reasons for nonrenewal of your contract and to make a final decision as to the matter. You will be notified of the Board's final decision within a few days thereafter.

Would you like to make a statement of response at this time, or would you prefer to respond in writing to the reasons?

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**[PLAINTIFF'S EXHIBIT 13]**

[LOGO]
Cloud County Community College

2221 Campus Dr.
P.O. Box 1002
Concordia, KS 66901-1002
(913) 243-1435

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June 9, 1989

Mr. Leo Dreiling
President of the CCCC Board of Trustees
1518 Highland Drive
Concordia, KS 66901

Dear Mr. Dreiling:

Now that I have had time to study and reflect on the "Reasons for Nonrenewal", I am doing what I said I would do in addition to my oral remarks, that is, I am submitting to you and to the Board some written remarks about them.

My initial reaction to the "Reasons" remains unchanged: they in no way constitute evidence and are merely tediously repetitious and totally unfounded malevolent fabrications and willful misrepresentations.

I will not deal with the "Reasons" 1 to 7. They have been amply dealt with by Mrs. Johnson and Mrs. Parker. I will concentrate on the "Reasons" 8 and 9.

The Administration, meaning Drs. Ihrig and Douglass, have, no doubt knowingly and malevolently purposefully, misrepresented what really happened. They lie when they say that I have terminated Mrs. Whitney. (Please see the attached copy of my memo of June 1 to Mr. Warner for my exact wording.) I well know that the

authority to employ and terminate belongs to the employer, the Board of Trustees. However, being LRC Director I have the authority to hire and dismiss, for a cause, any member of the LRC support staff. Even though Dr. Douglass has all along insisted that Mrs. Whitney, an LRC Assistant, is "protected" meaning that she is exempt from the test of performance (which is the legal prerequisite of lawful pay) and cannot, therefore, be dismissed, I dismissed her for a well-documented good cause – non-performance. Dr. Douglass explicitely [sic] stated that I have the authority to dismiss any member of the LRC support staff except Mrs. Whitney. I categorically reject the implication that Mrs. Whitney enjoys a special administrative and legal status. According to the Support Staff Policies, all LRC support staffers have equal administrative and legal status and thus all are subject to the test of performance.

My position of LRC Director confers upon me the authority and the responsibility to evaluate the LRC support staffers and to approve their time-sheets for wage payments just as it confers upon me the authority and the responsibility to develop and maintain – to hire and to dismiss – the LRC support staff. There is a simple yet profound difference between dismissal and termination: termination means the ending of employment with CCCC while dismissal means the ending of membership on the LRC support staff. Thus a dismissed LRC support staffer remains an employee of CCCC and may be either reassigned or terminated by the competent authorities – the Business Manager and the Board of Trustees. It is obvious that by dismissing Mrs. Whitney from the LRC support

staff I have not and could not have violated any Board policies.

So what is left of the laundry list is "Reason" 9.

I have already established that what took place was a dismissal rather than termination. Rewritten accordingly, "Reason" 9 reads: "Dismissal of support staff employee knowingly in direct contradiction of administration /sic/ intentions and desires." Now, a direct contradiction signifies the opposite. The opposite of dismissal is retention. Thus what the "Reason" 9 says is that the Administration desires and intends to retain Mrs. Whitney in her LRC position. But Mrs. Whitney has been found unfit fot [sic] that position and has completely failed the test of performance. Consequently, the Administration's intention to retain her in her LRC position is an intention to continue to violate the laws governing public employment and the disbursement of public monies. It is, in fact, a criminal intention. This corrupt Administration is asking your approval of this intention and your cooperation in carrying it out.

In order to carry it out, the Administration seeks my termination. It seeks my termination not because of proven nonperformance, but because I blew the whistle on the corruption involved in Mrs. Whitney's presence on the LRC staff. The Administration assumes that by getting rid of me they, Drs. Ihrig and Douglass, will be able to carry on as usually [sic] – disregarding all laws, collegiate, public and moral, and shirking all accountability.

Naturally, I would like to know as, I am sure, you and the Board would like to know why the Administration is doing all this. There must be reasons for their actions. But

these reasons cannot have anything to do with the College. Mrs. Whitney has not been an asset but rather a liability to this College. They could only be private reasons. The Administration has expended college funds and intends to continue to expend them for reasons that have nothing to do with the good of the College. Such use of public monies constitutes malfeasance and malfeasance is a felony.

Why would Drs. Ihrig and Douglass pursue such reckless, irresponsible and, ultimately, self-destructive course of action? It seems to me that the Board should investigate or have investigated the reasons for the Administration's bizarre behavior.

We are really looking forward to your and the Board's get-acquainted visit to our Center.

Sincerely,

/s/ Dr. Frank P. Kosik
Dr. Frank P. Kosik
LRC Director

cc/ Mr. Frank Brunell
Mr. Robert C. Champlin
Mr. Keith Christensen
Mr. Lloyd Erickson
Mr. Dan Farha

*Enclosures*: "Reasons for Nonrenewal."
My June 1 memo to Mr. Warner.